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THE OFFICE OF PUBLIC DEFENDER.—By the United States Constitution,¹ and by constitutional or statutory provisions in most of the States,² every person accused of crime is guaranteed the right to have counsel. This right, now regarded as fundamental, is a comparatively recent development in our law; for as late as 1836 in England the accused in most felony cases had no right to counsel unless a point of law arose.³ There is now provision by legislation in England,⁴ most of the American states,⁵ and under the federal law,⁶ for the assignment of counsel by the court if the accused is unable because of poverty to hire an attorney. Even where there is no express statutory provision the court may appoint counsel to defend indigent persons;⁷ and this is the general practice.

This method of providing for poor defendants has been attacked as inadequate, and an effort is being made to have created in cities the office of Public Defender, the latter to be a county official to act in place of appointed attorneys. It is urged that assigned counsel are usually inexperienced and often negligent; that, in consequence, poor defendants are not properly represented; that the prestige of criminal courts is injured; and that justice is in some cases defeated.⁸ A capable public officer, backed by the prestige of the state, with means of thorough investigation and acting in harmony with existing officers, could, it is claimed, render much more satisfactorily than assigned counsel the public service of defending accused persons.

¹United States Constitution, Amendments, Art. VI.

²"This ordinance was intended to soften the rigors of the common law which gave to persons accused of crime the right to appear for themselves but deprived them of the right to be heard through or represented by counsel learned of the law." *Hopkins v. State* (1882) 78 Tenn. 204.

³*Journal Am. Inst. of Crim. Law and Criminology*, Vol. I, p. 737.

⁴"But it is a settled rule at common law that no counsel shall be allowed a prisoner upon his trial upon the general issue in any capital crime unless some point of law shall arise proper to be debated." IV Blackstone Comm., c. 27, p. 355.

⁵Poor Prisoners Defense Act (1903) 3 Edw. VII, c. 38. In France counsel for poor persons is assigned by the president of the bar association. Parmelee, *Anthropology and Sociology in Their Relation to Criminal Procedure*, p. 276.

⁶Some statutes provide for the appointment in all criminal cases, others in cases of felony, and some only in cases of capital offenses. In many instances the appointment is optional with the trial judge. There seems to be no express statutory provision in Kentucky, New Mexico, North Carolina, Oregon, and Pennsylvania.

⁷U. S. Comp. Stat. 1916, § 1700.

⁸"The appointment by the court of attorneys to defend indigent persons accused of crime who are without counsel and without the means of employing legal assistance is not, properly speaking, the exercise of a fundamental right or power inherent in the court, but such authority is implied from the jurisdiction and powers expressly conferred, and the functions and duties imposed and the general statutes and policy of the state providing for the necessities of the poor which reasonably include a fair opportunity of protecting their rights as litigants in court of justice." 2 R. C. L., Attorneys at Law, § 28.

⁹The chief arguments in favor of the public defender may be found in Goldman, *The Public Defender*; Parmelee, *op. cit.* 273 *et seq.*

The proposal has been severely criticised by some members of the bar,⁹ and the opponents of the plan point out the many protections afforded to the defendant by our present criminal procedure: the presumption of innocence, arraignment before a magistrate, indictment, investigation by the county attorney, trial by jury, and the necessity of proving guilt beyond reasonable doubt. It is further contended that the establishment of the office of public defender would provide a means of aiding wrongdoers in defeating justice; and that the defects of the present system are greatly exaggerated, since the abuses, if any, arising from unprofessional conduct by assigned attorneys are subject to surveillance by the bar associations.¹⁰

There is no doubt that much of the criticism of the present situation is unwarranted. But it would seem that by providing for the assignment of counsel the community has recognized that justice demands some provision for legal aid for the accused. The most efficient and just way to provide for this, it is submitted, would be to designate a capable and responsible public officer for that purpose. To rely, as we do now, on an appointed attorney whose chief interests are necessarily his private practice is, in the opinion of eminent jurists, a course open to serious criticism.¹¹

Public defenders have already been provided for by legislation in several jurisdictions in this country. The first official¹² to be put in charge of the defense of the poor in criminal actions took office in Los Angeles in January, 1914.¹³ He is appointed by the county board of supervisors and has charge of the defense of all poor persons who request aid in criminal cases in the county courts.¹⁴ In addition, he has limited duties in civil actions. The conduct of the office has met with the approval not only of the justices but of the district attorney; and public prosecution seems to have worked harmoniously with public

⁹Report Law Reform Committee, New York Bar Ass'n., January 1915. Report Committee on Courts of Criminal Procedure, New York County Lawyers' Ass'n., November 1914, reprinted 9 Bench & Bar (N. S.) 305. For a criticism of the latter report see Journal Am. Inst. of Crim. Law and Criminology, Vol. V, p. 925.

¹⁰9 Bench & Bar (N. S.) 309 *et seq.*

¹¹Speaking before the judiciary committee of the New York Constitutional Convention of 1915, Presiding Justice Almet F. Jenks, New York Supreme Court, Appellate Division, Second Department, said: "I have seen so many poor, friendless, homeless wretches have their liberties put at stake through some inefficient tyro being named to defend them that I feel very strongly some change should be made." See also foreword by Justice Wesley O. Howard, Goldman, *op. cit.*

¹²In 1911 in Oklahoma a bill providing for an officer to be known as "public defender" passed both houses of the legislature and became law through the failure of the Governor to return it unsigned within the constitutional period. The duties of the office are to act as counsel to the Commissioner of Charities and Correction and to bring or defend suits on behalf of orphans and delinquents for whom the Commissioner is "next friend". The public defender has no duties in criminal cases outside of those mentioned above. For a discussion of this office see Case and Comment, Vol. XIX, p. 307. The act creating the office does not appear in Bunn's Supp. Rev. Laws Okla. 1915.

¹³See Journal Am. Inst. of Crim. Law and Criminology, Vol. IV, p. 650.

¹⁴In 1915 an officer was appointed to act as public defender in the police courts in the city of Los Angeles. Goldman, *op. cit.* p. 82.

defense.¹⁵ In 1915 a statute in Nebraska¹⁶ created the office of public defender in all counties having a population of more than 100,000. The official is elected for a term of four years, and appears for poor persons accused of crimes punishable by death or imprisonment in the penitentiary. During the year 1915 the office of public defender was also created for the city of Portland, Oregon, by resolution of the city council;¹⁷ and volunteer public defenders, not recognized by statute, are serving in several cities.¹⁸

The most recent statute on this subject was enacted by the Virginia Legislature in 1916.¹⁹ The judges of criminal courts having jurisdiction in cities with a population of 50,000 or more may at their discretion appoint a competent attorney to defend on request all persons accused of crime if the court deems the defendant unable to employ counsel. The term of office is two years, and the official is removable by the judge appointing him. No salary is provided except that the councils of the respective cities may make an appropriation for that purpose. While the appointment of this officer is optional, it seems that the statute, in making it possible for judges to adopt the practice, takes a step toward putting the defense of the poor in more responsible hands. While the failure to provide salary may fail to make the office attractive to many able lawyers, any effort to put this important means of securing justice on a systematic basis is to be commended.

¹⁵Journal Am. Inst. of Crim. Law and Criminology, Vol. V, p. 442.

¹⁶Neb. Laws 1915, c. 165, § 1.

¹⁷Goldman, *op. cit.* p. 82.

¹⁸In Evansville, Ind., Temple, Tex., Pittsburgh, Pa., and Columbus, Ohio.

¹⁹Va. Acts 1916, c. 204.